

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2606

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To be argued by
T. GORMAN REILLY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2606

UNITED STATES OF AMERICA,

Appellee,

—v.—

GABRIEL MARIN,

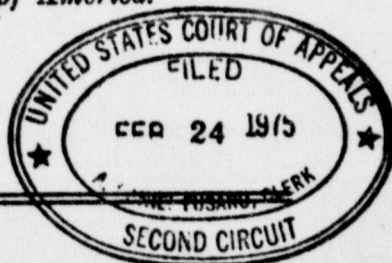
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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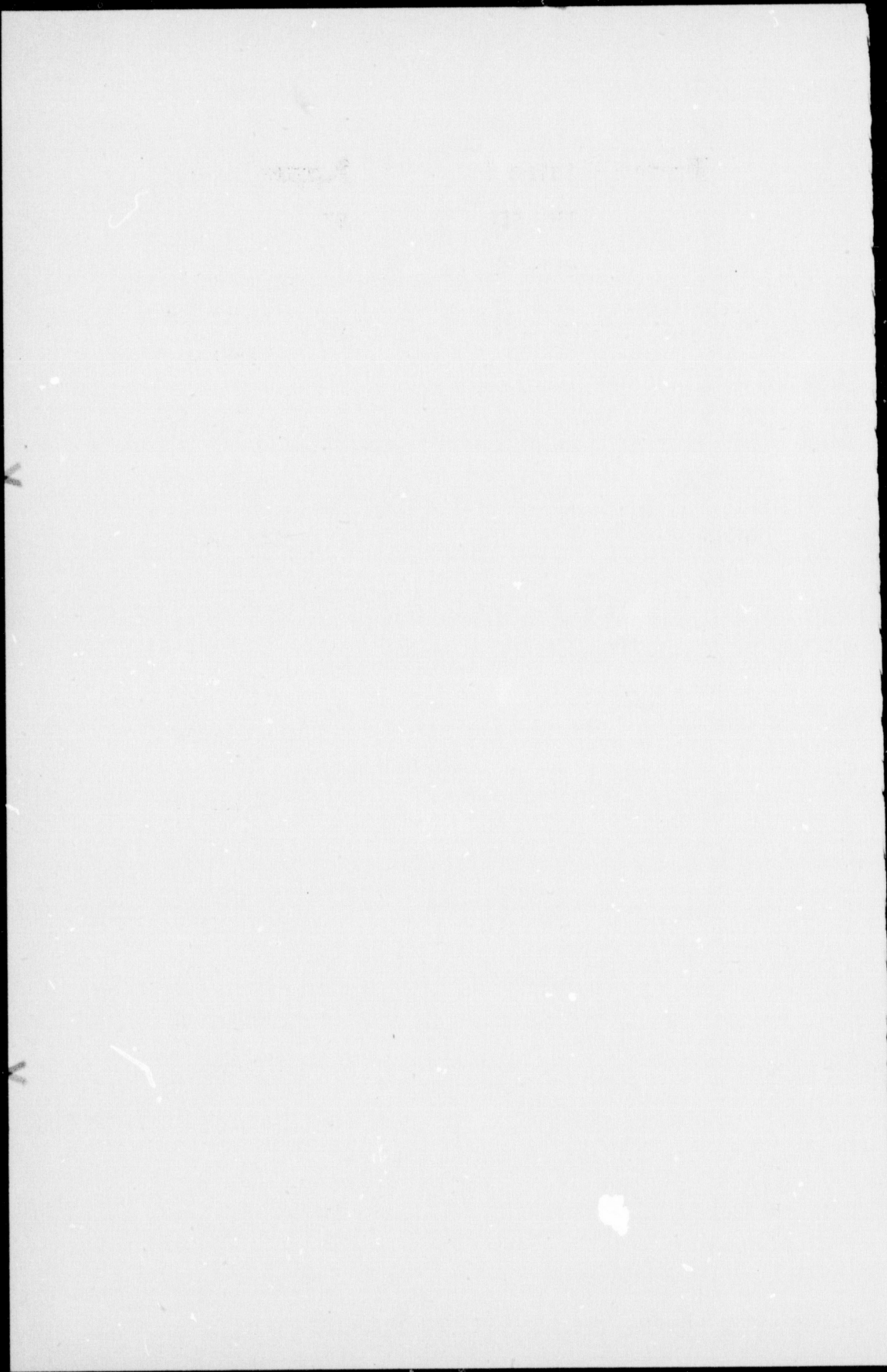
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2606

UNITED STATES OF AMERICA,

Appellee,

—v.—

GABRIEL MARIN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Gabriel Marin appeals from a judgment of conviction entered on December 2, 1974, in the United States District Court for the Southern District of New York after a three day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 74 Cr. 379, filed on April 11, 1974, charged Marin with unlawful possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

Trial commenced on November 22, 1974 and concluded on November 25, 1974, with a guilty verdict.*

On December 2, 1974, Judge Frankel suspended imposition of sentence and placed Marin on probation for thirty months, with the special condition that he complete a drug rehabilitation program at Phoenix House on Harts Island. Marin is currently at Phoenix House.

* The Government offered evidence in support of two theories of guilt: (1) that the defendant actually possessed a small quantity of cocaine with the intent to distribute it; and (2) that the defendant attempted to possess a larger quantity of cocaine with the intent to distribute it. The Court allowed the case to go to the jury on the attempt theory only.

Statement of Facts

The Government's Case

In early December, 1973 Jose Manuel Caicedo was preparing for a flight from Bogota, Colombia to New York City via New Orleans. His preparations included grinding down six ounces of rock cocaine, placing the resulting powder in plastic bags, and secreting these bags inside the lining of a sports jacket he planned to wear. This cocaine had been given to him on consignment by Gustavo Santos, who also provided him with the name of a potential customer in New York, Carmine Comizio. It was agreed that Caicedo would pay \$2,100 to Santos upon selling the cocaine in New York. Before leaving Bogota Caicedo also inquired of Gina Rosas, the sister of a close friend and a person who handled bookings for American rock music groups, whether she could recommend any buyers for the cocaine in New York. She recommended the defendant, Gabriel Marin, whose name and telephone number Caicedo wrote down on a piece of paper which he then stuffed into a hole in one of the pockets of the drug-laden sports jacket. (Tr. 35, 38-42, 46)*

As Caicedo attempted to clear Customs in New Orleans on December 3, 1973, he was searched, and both the cocaine and the incriminating piece of paper were discovered. After being arrested Caicedo agreed to cooperate with the Drug Enforcement Administration by going forward with his plans to sell the cocaine as though he had never been caught. Pursuant to his prior agreement he telephoned Gloria Toro, an intermediary of Gustavo Santos in Bogota, and advised her that he had safely cleared Customs. He then boarded a flight to New York in the company of DEA Special Agent Ron Hall. (Tr. 43-49, 142-149, 204-205; A56-A57)

* "Tr." refers to the transcript of the trial; "A" to Marin's Appendix on Appeal.

Upon arrival in New York Caicedo telephoned Gabriel Marin at the number given to him by Gina Rosas.* On the first call he spoke with Marin's wife, who gave him another number where Marin could be reached. Caicedo reached Marin at that number and identified himself as a friend of Gina Rosas. He told Marin that he had brought six ounces of "merchandise" with him from Colombia and asked whether Marin wanted to buy any. Marin asked Caicedo how good the quality was and how much it would cost. Caicedo responded that it was 80% pure and that the cost would depend on the amount bought. Marin agreed to take all six ounces at \$650 per ounce and arranged to have Caicedo meet him at Eric's Bar on 88th Street and Second Avenue later that evening. (Tr. 49-52, 150-151; A28-A31)

Caicedo telephoned Marin again that evening to defer the meeting at Eric's Bar until the following afternoon. The next day Caicedo was fitted out with a concealed transmitter and traveled to Eric's Bar in the company of a Spanish speaking DEA agent, Raphael Halperin. Halperin carried with him a "dummy" package which had been made up earlier in the day by taking minute quantities from the plastic bags of cocaine which Caicedo had brought into the country from Colombia ** and mixing this cocaine in with about 4 ounces of quinine and starch. Halperin's undercover role was as Caicedo's New York associate. He stayed outside in a car and kept the purported 4 ounce package of cocaine with him while Caicedo met Marin and another person named Joe at a table inside. Marin asked to see a

* This and all subsequent telephone calls involving Marin were tape recorded by DEA Agents, and the tapes were put in evidence at trial. Since the conversations were in Spanish, transcripts in English—stipulated to be accurate—were also received in evidence.

** It was stipulated that the cocaine which Caicedo had when arrested was found by chemical analysis to be 93.7% pure.

sample of the cocaine. Caicedo, acting on instruction from the DEA agents, told Marin that he could have the entire package, but that no sample would be given. This caused some consternation which resulted in Caicedo going outside to confer with his "partner". Halperin instructed Caicedo to insist on seeing the money first before giving out any sample. When Caicedo reported this back to his potential customers in the bar, Marin complained that he was entitled to better treatment than that since he had come recommended from Gina Rosas. He emphasized that this was not his first or, indeed, his largest deal involving cocaine from Colombia. He boasted of an earlier \$15,000 to \$20,000 transaction. Eventually Marin, Joe and Caicedo stepped outside in an attempt to resolve the impasse with Halperin. Marin persisted in demanding the sample and told Halperin that the money would be no problem, that it would only take him 1/2 hour to get the money after looking at the sample. At this point Halperin told Marin that he would first stash the cocaine and return to discuss the matter further. Marin and Joe returned to the bar while Halperin and Caicedo drove off to meet with other DEA agents. The agents decided to give Marin the sample he was demanding and then arrest him. However, when Caicedo and Halperin returned to Eric's Bar, Marin and Joe had already left. (Tr. 53-58, 154-156, 191-201, 228-229, 231-232, A32-A36, A51-A55)

Later that evening Caicedo telephoned Marin and asked why he had left the bar. Marin voiced his annoyance at Halperin's attitude and his suspicion that Halperin might be a cop. He again requested to see a sample of the cocaine and arranged to meet with Caicedo for a second time at Eric's Bar, without Halperin. Caicedo later called to advise that he could not get away from Halperin for the meeting at Eric's Bar. He left a message for Marin to meet him on the afternoon of the following day, December 6th, at the Holiday Inn on West 57th Street, but Marin in turn was unable to get away from work. (Tr. 59-62; A42-A45, A48)

During the evening of December 6th Caicedo telephoned Marin at work. They agreed to meet at 11:00 p.m. that evening at the corner of 57th Street and 9th Avenue. Shortly before 11 o'clock Caicedo, with the four ounce "dummy" package, was dropped off at 57th Street by the DEA agents. Marin arrived shortly thereafter. Caicedo told Marin that he had spoken with Gina Rosas the evening before and that she had said Marin could be trusted. For this reason, Caicedo explained, he was willing to give Marin the four ounce package on consignment. Marin responded that he would call the next day, that he would give Caicedo the money for the four ounces, and that he would then pick up the remaining two ounces. Caicedo handed the package to Marin, who placed it in his coat. The two men then went their separate ways. As Marin stepped out in the street to hail a taxi he was placed under arrest by DEA agents. (Tr. 62-64, 230-231, 234; A48-A50)

During the course of processing at the DEA offices Marin conceded that he had met a girl in Bogota by the name of Gina Rosas, who he knew was supplying rock musicians with cocaine to smuggle into the United States. The following day, during an interview with an Assistant United States Attorney, Marin admitted that he had met with Caicedo to discuss a cocaine transaction. He also stated that Caicedo met him the previous night, gave him a four ounce package of cocaine, and told him that when Marin paid for the four ounces he would give him two more ounces. (Tr. 245-247, 260-261)

The Defense Case

Marin did not testify or present any evidence.

ARGUMENT

POINT I

The Jury Properly Found the Defendant Guilty of Attempted Possession of Cocaine With Intent to Distribute.

Marin argues that his conviction of attempted possession of cocaine with intent to distribute is invalid because the indictment returned by the Grand Jury only charged him with a substantive completed crime, not an attempt; because the indictment charges the illegal possession of 1 gram of cocaine whereas the proof at trial showed an attempt to possess four ounces of cocaine; because the Court failed to instruct the jury to disregard the charge of possession as set forth in the indictment; and because the Court refused to charge, as requested by Marin, on the lesser included offense of simple possession. None of these arguments has merit.

A. The indictment was valid

The one count indictment in this case charges Marin with the substantive crime of possession of cocaine with intent to distribute. (A4) It is conceded that the indictment does not explicitly charge the defendant with an attempt to commit this offense. However, under Fed. R. Crim. P. 31(c) a defendant may be found guilty of an attempt to commit a substantive offense whether or not the attempt so to do was charged in the indictment, provided an attempt is punishable (as it is here, 21 U.S.C. § 846). *United States v. Heng Awkak Roman*, 484 F.2d 1271 (2d Cir.), cert. denied, 415 U.S. 976 (1973), affirming on opinion below 356 F. Supp. 434 (S.D.N.Y.); *Simpson v. United States*, 195 F.2d 721 (9th Cir. 1952); *Small v. United*

States, 153 F.2d 144 (9th Cir.), *cert. denied*, 328 U.S. 838 (1946).^{*} In this respect the automatic incorporation of an attempt charge is similar to those cases where the indictment charges the commission of a substantive offense but the Court allows the case against the defendant to be submitted to the jury on a theory of aiding and abetting. *United States v. Pellegrino*, 470 F.2d 1205, 1209 (2d Cir.), *cert. denied*, 411 U.S. 918 (1973); *United States v. Tropiano*, 418 F.2d 1069, 1083 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970). Nonetheless, Marin insists that because the Grand Jury in this case chose to indict for the sub-

^{*} To be sure, the indictment charged the quantity actually possessed as one gram, while the quantity Marin attempted to possess was four—or perhaps six—ounces. However, this variance, if it was that, was immaterial to the case as tried and put to the jury in the Court's charge (Tr. 340). A variance between a charge in the indictment and the proof at trial is only fatal when "substantial rights" of the accused have been adversely affected. *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. D'Anna*, 450 F.2d 1201, 1204 (2d Cir. 1971). Where the indictment charges a different quantity of drugs from that proved at trial such a variance is deemed to be insignificant. *Calderon v. United States*, 269 F.2d 416 (10th Cir. 1959). See also *United States v. Wodiska*, 147 F.2d 38 (2d Cir. 1945); *United States v. Signore*, 115 F.2d 669 (7th Cir. 1940); cf. *United States v. Mercado*, 478 F.2d 1108 (2d Cir. 1973).

Considering the fact that Marin was arrested immediately after he received the four ounce dummy package and that he gave a statement to an Assistant United States Attorney the following day admitting his receipt of what he believed to be four ounces of cocaine (Tr. 245-247), Marin cannot claim that he was surprised by the Government's proof at trial. Moreover, no complaint was made during the trial about this difference in quantities. As Judge Frankel noted in ruling on Marin's requests to charge at the end of the case:

"One of the infirmities in the whole series of requests as things stand now, Mr. Geller, is they're all quite carefully framed in terms of that one gram of cocaine, which I believe, with your cheerful acquiescence is out of the case.

Mr. Geller: Yes." (Tr. 286)

stantive offense and did not choose to indict for the separate crime of attempting unlawfully to possess cocaine, the indictment therefore must be dismissed for lack of probable cause that defendant committed the substantive offense.

It hardly needs saying that this reasoning ignores the holding in *Heng Awkak Roman* and the plain words of Rule 31(c), which allows a conviction for an attempt or lesser included offense if the proof fails to make out the crime charged. It would be a pointless exercise to provide for such a result if a defendant upon conviction of a lesser included offense, could then move to dismiss the indictment for lack of probable cause on the greater charge. The logical import of Rule 31(c) is that an indictment which charges a specific offense is deemed to incorporate an attempt to commit that offense as well as the commission of any lesser included charge. Moreover, while in this case the trial judge required the Government to elect between a theory that a completed crime was committed and a theory that Marin was guilty of only an attempt—a distinction turning on the minute quantity of cocaine transferred from the “dummy” package delivered to Marin, the evidence at trial (Tr. 154-156) clearly demonstrated the accuracy of the Grand Jury’s finding of probable cause that Marin had actually possessed cocaine when he received the “dummy” package.

The absurdity of Marin’s position is highlighted by the hollow distinctions drawn in his brief between the operative facts in this case and those in such cases as *United States v. Heng Awkak Roman*, *supra*, and *Simpson v. United States*, *supra*, where convictions were affirmed. In *Roman*, Marin says, the substantive count of the indictment survived because it was coupled with a conspiracy count “obviously found on some evidence,” thus allowing the Court to proceed on whatever theory of constructive possession that developed from the relationship between the substantive and

conspiracy count. (Brief at 17) Again in *Simpson* we are invited to speculate that the Grand Jury had before it some evidence of constructive possession. (*Ibid.*)

Finally, the fact that the validity of this indictment is challenged for the first time on appeal is additional cause to reject defendant's attenuated argument in this regard. F. R. Cr. P. 12(b) (2); *United States v. Laverick*, 348 F.2d 708 (2d Cir.), *cert. denied*, 382 U.S. 940 (1965).

B. The evidence was sufficient to support the jury's verdict

Marin contends that the evidence was insufficient to show that he had the requisite intent to attempt to possess cocaine. Marin stresses that throughout his dealings with Caicedo he insisted on obtaining a sample and even on the night of his arrest he did not know what was in the package Caicedo pressed upon him. (Brief at 21-25).

The evidence in support of a contrary finding is substantial. Caicedo informed Marin, in response to Marin's pointed question, that the six ounces of "merchandise" which he brought from Colombia was 80% pure. Marin's enthusiasm to obtain the mysterious merchandise—at \$650 per ounce—prompted him to ask Caicedo to meet him at Eric's Bar that very evening with a sample. It is apparent from the numerous other telephone conversations between Marin and Caicedo and from the tape recording of their meeting at Eric's Bar on December 5, 1973 that the defendant's principal interest was to insure that the cocaine he was buying was as good as Caicedo claimed. In addition, the readiness shown by Marin to meet Caicedo at 11 o'clock on a cold December night along 9th Avenue, his prompt arrival at the designated time and place, and his promise to give Caicedo the money on the following day for the four ounce package he had just received, belie any claim that Marin had no formed belief as to the contents of the

package. Indeed, the day after his arrest, Marin told the Assistant United States Attorney who interviewed him that Caicedo had given him a package containing four ounces of cocaine.*

C. The Court's charge

On the second day of trial the Court required the Government to elect between its two theories of guilt under the indictment, indicating at the same time its strong doubt as to the validity of the possession theory. Although there was evidence that a small quantity of 93.7% cocaine had been taken from the package brought into the country by Caicedo and was directly placed in the four ounce package of quinine and starch ultimately given to Marin, the Government chose to proceed on the attempt theory alone.

At the end of the trial the Court summarized the charge in the indictment and the section of the law which makes it a crime to possess cocaine with intent to distribute. The Court then advised that it was likewise a crime to attempt to possess cocaine with the intent to distribute and put the jury on notice that this was the theory upon which the Government was proceeding:

* The same evidence disposes of Marin's contention that there was insufficient proof of his intent to distribute the substance he acquired as cocaine from Caicedo (Brief at 24-25). The delivery here was of four ounces of a six ounce quantity of supposedly 80% pure cocaine which Marin was to buy for \$650 per ounce. As Judge Frankel noted, there was no evidence at all that Marin was a cocaine user, and the proof showed that Marin intended to sell by the following day the four ounces of purported cocaine delivered to him by Caicedo. The request for a lesser included offense instruction on simple possession (21 U.S.C. § 844) was thus properly refused by the Court. (Tr. 286-290). *United States v. Carroll*, Dkt. No. 74-1138 (2d Cir., January 6, 1975), slip op. at 5965-5966; *United States v. Harary*, 457 F.2d 471 (2d Cir. 1972). See also *United States v. Sansone*, 380 U.S. 343, 349 (1965).

"... As this case has developed, you know that it is the Government's theory that Mr. Marin attempted to possess cocaine rather than actually possessing it, and that this possession was never accomplished..."
(Tr. 339)

The Court then proceeded to instruct the jury on the law of attempted possession of cocaine with intent to distribute. This was the only theory on which the Court charged. (Tr. 339-341)

Under these circumstances there is no support for Marin's contention that the instructions were equivocal or permitted the jury to mistakenly return a verdict on the possession theory.* Moreover, no such objection was raised by defense counsel at the conclusion of the Court's charge. Fed. R. Crim. P. 30.

POINT II

The Defendant Was Not Entrapped.

Marin contends that there was entrapment as a matter of law in that the Government forced the four ounce package upon him. The evidence adduced at trial shows this contention to be without merit.

The facts of this case, when examined in the light of the twin issues of Government inducement and defendant's predisposition, *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952), fail to establish a substantial defense of entrapment. The creative activity of the Government agents was minimal. Indeed, when Caicedo was arrested in New Orleans, the plan to bring the cocaine to New York, to contact Marin, and to sell as much of it to him as possible was already in motion. The Government merely intervened to monitor the progress of Caicedo's negotiations with

* The jury did not ask for or take the indictment into the jury room during its deliberations. (Tr. 356-370).

Marin and to substitute harmless ingredients for the six ounces of cocaine. Caicedo's instructions from Special Agent Hall were to carry on with the plan to deliver cocaine in New York just as if he had never been arrested. The inducement, such as it was, consisted of Caicedo's contacting Marin and later giving Marin the entire package of supposed cocaine instead of furnishing the requested sample. This was done not to overcome any revulsion on Marin's part to deal in cocaine. Rather, it was done for the obvious reason that a test of any sample would quickly show that it was starch and that Caicedo was probably a Government informant.

Marin's prior disposition to possess the cocaine is manifest from the transcripts of the tape recorded conversations he had with Caicedo. When advised by Caicedo, a man Marin had never met before, that he had brought six ounces of "merchandise" from Colombia, Marin immediately pressed him for the important details: quality and price. Within two minutes of their first exchange of greetings on the telephone Marin agreed to take the entire shipment, and it was he who arranged for Caicedo to come to Eric's Bar that evening with a sample. During the course of their meeting the following day at the bar Marin boasted of prior kilo quantity cocaine dealings in Colombia. He expressed some surprise that Caicedo only smuggled in six ounces. The hesitation shown by Marin was not to dealing in cocaine; rather, it was to dealing with Special Agent Halperin, whom he suspected of being a cop, and to paying a substantial amount of money for the entire package without first being assured that it was of the purity Caicedo claimed for it. (Tr. 55). There is no evidence in the record that the dummy package was forced upon Marin when he rushed to meet Caicedo on the evening of December 6th. The testimony of Caicedo and of Special Agent Siegel, who was on surveillance across the street, was that Caicedo handed the package to Marin and that Marin placed it inside his coat.

The issue of entrapment in this case was obviously one of fact to be resolved by the jury. *Osborne v. United States*, 385 U.S. 323, 331 (1966); *United States v. Henry*, 417 F.2d 267, 269-270 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970). The mere fact that the Government may have resorted to deceit in delivering a bogus package of drugs to Marin may not defeat the prosecution. *United States v. Russell*, 411 U.S. 423, 435-436 (1973). Likewise the Supreme Court has rejected Marin's claim (Brief at 27) that a prosecution may be barred where Government agents participate directly in the sale of controlled substances. *United States v. Russell*, *supra*, 411 U.S. at 427, 435. See also *United States v. Rosner*, 485 F.2d 1213, 1223 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

Marin objected to the Court's charge on entrapment on the grounds that by use of the term, "innocent person" it conveyed the impression that the defense was available only to someone who had never committed a prior crime. (Tr. 353-354). A reading of Judge Frankel's balanced and customarily precise charge leaves no such impression.* (Tr. 345-347). It is a far cry from the charge criticized by the Court in *United States v. Meade*, 491 F.2d 592 (3d Cir. 1974), where the trial judge at three different points stated that the defense of entrapment would come into play if the Government induced the defendant to commit a crime the like of which he had never committed before. *Id.* at 594. Also, Marin fails to point out that when the jury asked for a re-reading of the definition of entrapment (Tr. 359),

* The jury was told, for example, that:

"... the government, to overcome this entrapment defense, must have satisfied you beyond a reasonable doubt that before Caicedo got in touch with him, the defendant Marin was predisposed, was ready and willing and intending to engage in the kind of cocaine transaction which he is then charged with having carried out on the occasion in question." (Tr. 347)

Judge Frankel gave a revised supplemental charge which accommodated the defendant's objection.* (Tr. 360-363). Although invited, defense counsel made no objection to the charge as revised and with good reason. (Tr. 363).

POINT III

The Prosecutor's Remarks in His Opening and Closing Were Not Improper.

Marin contends that the prosecutor in his opening and closing statements made remarks which prejudiced his right to a fair trial. This contention is baseless.

Near the close of his opening statement the Assistant United States Attorney addressed the jury briefly on the function of the Government in the criminal case before them. Although defense counsel made no objection at the time he now contends that his client's right to a fair trial was prejudiced by what he claims was the Government's exhortation to the jury to do justice by enforcing the narcotics laws and convicting the defendant. The thrust of the prosecutor's remarks is not likely to be understood by a reading of the carefully truncated version ** set forth

* "[T]he issue is whether the defendant before that persuasion or inducement was a person ready and willing to commit that crime or whether, on the other hand, the acts of the Government's agents planted the idea in the mind of the person, this defendant, who was not at that point ready and willing to commit the particular crime, and whether, therefore, in that critical sense the actions of the Government agents created the crime that's being prosecuted". (Tr. 362)

** This kind of editing by defense counsel had been criticized by this Court. *United States v. Pacelli*, 491 F.2d 1108, 1120 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3192 (October 15, 1974).

by Marin in his brief. (Brief at 29). The Government submits that the full text * of the remarks in question demonstrate a sensitivity to the dual obligation of the prosecutor to see that guilt shall not escape or innocence suffer. *Berger v. United States*, *supra*, 295 U.S. at 88. The importance of the enforcement of the narcotics laws was a perfectly proper

* The second point I wish to emphasize is somewhat related to the first, and that is the function of the Government in this case. The government's function is to present evidence to you relating to the commission of a criminal offense by this defendant and it is to persuade you beyond a reasonable doubt that that evidence warrants conviction.

It is not the function of the Government, not the desire of the U.S. Attorney, not my personal desire, to win this case or any other case. It is not a question of winning, it is a question of doing justice, and the government is interested in justice and a fair trial for the defendant, just as much as he and his attorney are.

If you don't find that the government has brought before you convincing evidence, evidence that can persuade you beyond a reasonable doubt, you must not hesitate to acquit this defendant. He is not guilty under those terms. If that, after careful deliberation, is your decision, the government will be fully satisfied with it.

By the same token, the government is entitled to a fair trial, too. And you are not entitled, out of sympathy for the defendant or out of a feeling that somehow one party is getting off lightly and another party is not, to acquit the defendant. You must just weigh the evidence and come to the conclusion that the evidence demands.

And that brings me to my third point, and that is that this is an important case. Now, it's important to the defendant for very obvious reasons. But it is also important to the government because it is the obligation of the Drug Enforcement Agency and it's the obligation of the government to see that our narcotics laws are enforced fully, fairly and equally. You should bear that in mind when you consider the evidence and when you ultimately adjourn for your deliberations." (Tr. 25-26).

point to make to the jury. *United States v. Ramos*, 268 F.2d 878, 880 (2d Cir. 1959).^{*} Even if the remarks were objectionable, they hardly rise to the level warranting reversal in the absence of objection below. *United States v. Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

In his summation the Assistant United States Attorney made reference to the fact that the accomplice, when arrested, decided to cooperate with the Government in an undercover capacity "at some risk to himself." (Tr. 320). This innocuous comment has become the springboard for Marin's contention on appeal that the prosecutor impermissibly testified that he knew of evidence not produced at trial that showed that Marin threatened Caicedo with bodily harm. (Brief at 30) The contention is fanciful at best. The fact that every undercover investigation involves some element of risk should be obvious to all. There was evidence that as part of the investigation Caicedo met with Marin and his associates at Eric's Bar alone and under circumstances totally unfamiliar to him. He was fitted out with a concealed transmitter for both meetings with Marin. It would surely be a source of danger to anyone in his position if the transmitter were discovered. Further, there was testimony in the record elicited by defense counsel, that Special Agent Hall briefed Caicedo on his personal security. (Tr. 182).

Even if the prosecutor's brief and passing comment had not been supported by any evidence at trial, that fact would not warrant reversal on the record of this case. *United States v. Alberti*, 470 F.2d 878, 882 (2d Cir. 1972),

^{*} Indeed, Marin's criticism of this statement is remarkable in view of his counsel's attempt, cut off by Judge Frankel, to argue in summation that cocaine was not shown to pose the same dangers to the community as heroin. (Tr. 292).

cert. denied, 411 U.S. 919, 965 (1973); *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939); *United States v. Trutenko*, 490 F.2d 678 (7th Cir. 1973). Defense counsel made no objection to the comment below. *United States v. Briggs, supra*. If error, it was surely harmless.

POINT IV

It Was Not Error For the Court to Allow the Jury to Take the Transcripts of Tape Recordings into the Jury Room During Deliberations or to Admit the Six Ounces of Cocaine Found on Caicedo at the Time of His Arrest.

Marin contends that it was error to allow, over objection, the transcripts of his tape recorded conversations to be taken into the jury room during deliberations. He also contends that it was unfairly prejudicial to allow the six ounces of cocaine, which had been smuggled into the country by Caicedo but which were intercepted before they could be delivered to Marin, to be received in evidence. Both claims lack merit.

A. The Transcripts

As Marin concedes, this Court has approved the practice of allowing transcripts of tape recordings to be received in evidence and taken into the jury room. (Brief at 31) See *United States v. Carson*, 464 F.2d 424 (2d Cir.), *cert. denied*, 404 U.S. 949 (1972); *United States v. Koska*, 443 F.2d 1167, 1169 (2d Cir. 1971), *cert. denied*, 404 U.S. 852 (1972). He argues that the result in this case was prejudicial because it placed vividly before the jury evidence with respect to only one element of the entrapment defense, i.e., the defendant's predisposition. The short answer to this is that the jury by requesting the transcripts was expressing

its interest in examining only what appeared in those transcripts.

The need for using these transcripts makes it all the more understandable why the jury called for them and why the Court allowed them to be taken into the jury room. Each of the recorded conversations was almost entirely in Spanish. The Government prepared transcripts of the conversations as translated in English, to the accuracy of which defense counsel stipulated. (Tr. 214). During the trial the Government proposed to introduce the tapes and the transcripts in evidence. Defense counsel initially objected to the transcripts being received in evidence and taken into the jury room during deliberations. The Court indicated surprise that defense counsel was not willing to allow the transcripts to be received and considered by the jury during deliberations since the translations were stipulated to be accurate. The Court further explained that the only alternative would be to have the tapes played to the jury, to have a Spanish interpreter take the stand and provide a translation, and, if requested by the jury during deliberations, to have the court reporter read the testimony of the interpreter to the jury in open court. In the absence of a stipulation the Court expressed its willingness to follow such a procedure.* Defense counsel elected to stipulate. (Tr. 215-217). His stipulation waived the claim now made.

* "The Court: . . . [Y]ou will incur my mild displeasure, but I will do that if that rigamarole seems to you to aid the interests of your client.

Mr. Geller: I don't believe so.

The Court: . . . So if the transcript comes in, the jury may have them. If you want the translation to come in some other way, I can't make you stipulate, we'll have it come in some other way.

Mr. Geller: No, your Honor, that's not my desire.

* * * * *

Mr. Geller: I understand the Court's ruling and I still intend to stipulate, so we'll act accordingly." (Tr. 216-217)

An additional factor which made the jury's request to examine the transcripts an understandable one is **that the** Government, with defense counsel's concurrence, did not read the transcripts to the jury when they were received in evidence. (Tr. 216-217, 263-264) They were only referred to in summation.

B. The Cocaine.

Marin's contention that the receipt in evidence of six ounces of cocaine was prejudicial to his right to a fair trial is, on this record, worthy of little response. He was convicted of attempting unlawfully to possess cocaine; the testimony showed that he negotiated for and received what he believed to be four ounces of cocaine; the transcripts reveal that he claimed to have dealt in even larger quantities of the drug in the recent past. The cocaine exhibit to which Marin objects is the very cocaine which Caicedo brought from Colombia to sell to Marin, and there was no objection to Caicedo's testimony on this point. Had not the Government agents intervened and substituted a dummy package the allegedly prejudicial and unrelated exhibit would have been delivered to Marin. Obviously, the facts here are quite different from *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973), on which Marin relies, for in that case the trial judge admitted a suitcase filled with five kilograms of noisome hashish, small amounts of heroin and pharmaceutical paraphernalia, none of which had anything to do with the two complaining appellants or the charges against them. See also *United States v. Drummond*, Dkt. No. 74-2264 (2d Cir., February 11, 1975) slip op. at 1792.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. Gorman Reilly being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *24TH* day of *FEBRUARY* *1975*
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

RUBIN, GOLD & Geller
299 Broadway
New York, N.Y. 10007

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

Sworn to before me this

24TH day of *February* *1975*



GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975

Gloria Calabrese